

SOUTH AFRICA / JUDGMENT

Du Toit and Another v Kruger N.O and Others (18777/23) [2024] ZAWCHC 281 (26 September 2024) [2024] ZAWCHC 281

COURT

Western Cape High Court, Cape Town

BEFORE

Nziweni

CASE / FILE NUMBER

18777/23

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FLYNOTES: WILLS AND ESTATES – Executor – Discretion bestowed by will – Immovable properties sold by executor – Respondents and other heirs to estate were against sale of properties – Alleging that sale agreement is invalid – Testator’s intention was to give executor unfettered discretion regarding sale and renting of property – Executor had absolute discretion to sell or lease property and to determine price – Terms of will prevail – Respondents directed to pass transfer of properties to applicants – Administration of Estates Act 66 of 1965, s 47.

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 18777/23

In the matter between: GRAON DU TOIT First Applicant CHRISTELENE DU TOIT Second Applicant and KOBUS KRUGER N.O. (In his personal capacity as well as in his representative capacity As the Executor in Estate Late: JD Kruger with Masters Reference Number: 031077/2014) First Respondent MARIA COOK N.O. (In her personal capacity as well as in her representative capacity As the Executrix in Estate Late: JD: with Masters Reference Number: 031077/2014) Second Respondent THE MASTER OF THE HIGH COURT Third Respondent

JUDGMENT DELIVERED: THURSDAY, 26 SEPTEMBER 2024

NZIWENI, J

Introduction

- [1] This is an application to enforce the terms of a Sale Agreement that was entered into between the former executor (“the erstwhile executor”) and the applicants. In terms of which two immovable properties were sold by the erstwhile executor to the applicants. The issue to be determined in this application arises in connection with clause 4.1.1. of the will of the late J.D. Kruger (“the testator”) and the provisions of section 47 of the Administration of Estate Act, Act 66 of 1965 (“section 47”). The core dispute in this litigation revolved around whether the provisions of section 47 override clause 4.1.1. of the will in question.
- [2] The application is opposed by the first and second respondents (“the respondents”). The respondents are currently the executors of the estate. The respondents were requested by the applicants to take the necessary further action to pass the transfer to them. However, they failed to do so.
- [3] The respondents were appointed as executors of the estate on 20 April 2022. The first respondent is also a son of the testator as well as an heir of the estate.
- [4] The applicants are husband and wife, and they are married in community of property.

Background

- [5] On 28 July 2014, prior to his death, the testator executed his will before two witnesses. In his will the testator appointed Barnito Charles Klassen [erstwhile executor] as an executor. In terms of the will, amongst others, the erstwhile executor was given powers to sell or rent out the immovable property of the testator.
- [6] On 24 January 2018, the first and second applicant entered into a sale agreement with the erstwhile executor to the estate of the late J.D. Kruger. In terms of the Sale Agreement the erstwhile executor sold two immovable properties to the applicants. The two properties are described as Bella Vista Liquor Store and an erf in Ceres. Before the registration of a transfer was affected, the erstwhile executor was removed as the executor on 09 September 2021.
- [7] According to the applicants, on 14 February 2018, at the erstwhile executor’s instance, they paid an advance amount of R295 000.00 towards the purchase price of the properties, which is R900 000.
- [8] On or about October 2018, the applicants and the erstwhile executor signed necessary documents to effect the transfer of the property. In the liquidation and distribution accounts filed with the third respondent, the properties in question are listed as realised by private sale.
- [9] The applicants took possession of the properties and are liable to pay rent until the date of the registration. The applicants still remain in possession of the properties.
- [10] On 06 February 2019, the applicants made payments towards the transfer fees.

- [11] Due to the failure of the erstwhile executor, to pass the transfer to the applicants, they instituted legal proceedings against him, in order to enforce the terms and conditions of the agreement of sale. Pursuant to the removal of the erstwhile executor as the executor of the estate, the applicants withdrew the case against him.
- [12] On 09 September 2021, the erstwhile executor was removed as the executor to the estate of the testator. According to the letter from the third respondent's office, this is so because the erstwhile executor was removed in terms of section 54 (1) (b)
- (v) of the Administration of Estate Act.

Amendment

- [13] In his address, Mr Quinn on behalf of the applicants requested an amendment to the notice of motion. The amendment sought is to replace the word "obtain" in prayer two of the notice of motion and replace it with the following words: "do all the things necessary steps to seek". Mr Holland on behalf of the respondent did not object to the amendment. Correctly so. Consequently, the amendment sought is effected.

Parties'

submissions

Respondents'

submissions

- [14] It is submitted on behalf of the respondents that the respondents as well as the other heirs to the estate of the testator were always against the sale of the properties as they wanted to protect the legacy by continuing with what the testator had started. It is also asserted that the erstwhile executor was aware of these wishes but chose to act as he deemed fit.
- [15] It is further contended that the executor has a fiduciary duty to act in the best interest of the estate and the heirs. It is alleged in the founding affidavit that the fiduciary duty entails that if an executor decides to sell an immovable property, it has a duty to ensure that the highest possible profit is generated for the estate. It is further asserted in the founding affidavit that the decision to sell two profitable businesses without having the properties and businesses formally valuated by experts is irregular.
- [16] In the present case, of course, the respondents have been at pains to point out that upon reading of section 47, generally, the sale of immovable property belonging to a deceased estate requires an heir's consent to the manner and conditions of the sale and, if such consent is not given, then the property is to be sold in a manner and on conditions of the sale and, approved by the Master.

- [17] The second strand of the respondents' argument can be described in the following way. In the context of section 47, the legislature's intention was to ensure that the views of the heirs would be taken into account in determining the manner and conditions of the sale of an estate's assets. Mr Holland illustrated his argument by suggesting that this is evident from the fact that the legislature provided that the executors were first to seek to secure the agreement of the heirs to the manner and conditions of sale. And in the event the agreement is not forthcoming, the Master must be approached. It is argued on applicant's behalf that even when that takes place, the views of the heirs will be a relevant consideration for the Master to take into account.
- [18] It is strongly asserted that the consent of the beneficiaries should have been obtained prior to the Sale Agreement being concluded. So, the argument continues that despite the clause of the will, the heirs with interest in the property should have approved the conditions in writing. The respondents maintain that they were never informed of the sale of the properties as heirs of the estate. It is further averred that had they been informed of the sale; they would have objected to it.
- [19] The essence of Mr Holland's argument is that the Sale Agreement is not valid. It is further averred that the Sale Agreement relied upon by the applicants was still subject to the approval of the Master. More generally, Mr Holland also submits that the provisions of section 47 are peremptory and the non-compliance with them renders the agreement of sale a nullity.

Applicant's

submissions

- [20] It is the assertion of the applicants that the estate, including the first and the second respondents, are bound by the Agreement of Sale and that the enforceability thereof has not been affected by the change in executorship. Additionally, the applicants assert that no steps have been taken by the respondents to render the Agreement of sale null and void.
- [21] The applicants further argue that even if the respondents or the executors may argue that the delay in passing transfer to them is due to the unresolved queries with SARS that makes it impossible to get the necessary clearance certificates, this can be circumvented by reaching an agreement with SARS.
- [22] According to the applicants' argument, to date and after several requests the respondents/ executors refuse to take the necessary further action to pass transfer to the applicants. The liquidation and distribution account filed with the Master lists the properties as realised by private sale; so the argument ran, the erstwhile executor certified the contents of the account to be correct.

- [23] It is also contended by the applicants that the erstwhile executor had the necessary authority to conclude the Agreement of Sale as per the Letters of Executorship issued on 20 November 2014.
- [24] The thrust of the applicants' argument is that, as far as section 47 is concerned, it is open to anyone to exclude the provisions of the section in terms of a will. In the course of the argument by the parties I was referred to authorities dealing with the provisions of section 47. Mr Quinn placed reliance on the authority of *Bagnall NO and Others v Acker NO and Others* [2021] 1 All SA 377 (WCC) (19 November 2020).
- [25] It was further asserted that section 47 kicks in to fill the gaps. Additionally, it was argued on behalf of the applicants that though the provisions of section 47 are peremptory, there is a qualifier built into it.

Evaluation

- [26] In the respondents' answering affidavits there are various issues raised attacking the Sale Agreement. However, during the hearing of this application, Mr Holland on behalf of the respondents mentioned that the respondents' argument is only going to be confined to the arguments that are centred around section 47. According to Mr. Holland this is also evinced in the respondents' heads of arguments that only deal with section 47. It is thus common cause that the respondents have crystallised the issues into one point.

The issue

- [27] It is significant to note that the issue to be determined herein is quite straight forward. As mentioned earlier, the issue that crystalised for determination by this Court is the effect of section 47 on an otherwise valid will.
- [28] It seems evident from a reading of the will that the testator's intention was to give the erstwhile executor unfettered discretion as far as the sale and renting of the immovable property are concerned. According to the respondents, this cannot happen in light of the provisions of section 47.
- [29] To elucidate this position further it is necessary to set out the relevant statutory provision in full. Section 47 provides as follows:

"47 Sales by executor

Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

- (a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or

- (b) if the said heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve”

[30] Only one clause of the will is material, clause 4.1.1. The clause in question, under the heading ‘ONROERENDE EINDOM’, is expressed in the following terms:

“4.1.1. Ek bepaal en verleen aan my Eksekuteur die diskresie om my onroerende eiendomme te verkoop of te verhuur asook om die prys daarvan te bepaal;

My Eksekuteur se besluit sal finaal wees in voormelde uitoefening van su diskresie en nie hersienbaar in enige forum nie; Ek bepaal die opbrengs uit die gelede verkoop van my plaas Olckersia Ceres in trust gestor ten aangewende te word ten behoeve van my begunstigdes;”

[31] According to Mr Quinn, on behalf of the applicants’, freedom of testation should prevail in the instant case. In other words, the intentions of the testator must prevail.

The executor’s discretion

[32] I observe that it is common ground in this application that the terms of the will reveal that the erstwhile executor had absolute discretion to sell or to lease the immovable property and to determine the price. The same unanimity between the parties is absent on whether the testator’s decision in this regard is legally binding. The testator in his will has used words like “My executor’s decision shall be final and not reviewable in any forum.”

[33] In the meantime, however, the respondents seek to draw an analogy between this case and an unreported case of Mar-Deon Boerdery CC v Marais N.O and Others (30031/2021)

[2021] ZAGPPHC 887 (29 November 2021).

[34] I believe that the Marais authority relied on by Mr Holland is readily distinguishable from the facts of this matter. There is no indication in the Marais matter whatsoever that it bears any resemblance to the facts of the present case.

[35] When regard is had to the Marais case, its facts are manifestly different due to the fact that there is no reference made in it to the clause of the will dealing with the sale of immovable property. In the Marais matter, the court distilled the issues in that matter as being the following:

- a) Firstly, whether the provisions of section 47 are peremptory, rather than directory; and
- b) Second, if Section 47 is indeed peremptory, whether non-compliance with the peremptory provisions of section 47 renders the contract a nullity.

[36] In the Marais matter there is nothing to suggest that as far as the sale of immovable property was concerned, that the testator gave the executor an unfettered discretion to sell the property as he saw fit, to whomever he wanted.

- [37] What is more is that all that is demonstrated by the facts of the Marais case is that after the passing away of the testatrix, the executor of the deceased estate took the decision to sell the immovable property. Thus, the Marais decision was not principally concerned with a possible scenario of a sale of immovable properties that could possibly be contrary to the will of the testatrix.
- [38] Additionally, the facts of the Marais case reveal that there were two agreements of sale entered into by the executor, selling immovable property of the estate. The first one, the applicant to the case was the purchaser, and in the second one, the heir was the purchaser. The heirs of the estate did not want to provide consent to sell the property to the applicant. The court in the Marais case then found that the applicant's contract of sale was void because when the contract was concluded neither the heirs, nor the Master approved the manner of sale and the conditions of sale.
- [39] Thus, the question in the Marais case was quite narrow in scope, compared to the present case. It dealt with the interpretation of section 47. Essentially, the Marais matter did not grapple with the combination and the interface between the words used in the will and the provisions of section 47.
- [40] As previously mentioned, it is clear from the foregoing that this case differs somewhat from the Marais matter. As such, it [the Marais authority] does not assist with the determination of the issues in the present case.
- [41] In the present case, the will is detailed as far as the powers of the executor in selling the immovable property. In this matter, in essence, the testator stated in his will that the executor can deal with his immovable property as he saw fit.

Intentions of the testator

- [42] In the instant case, it is not difficult to tell what the testator's intention was as his intent is plainly expressed. It is evident that clause 4.1.1. contradicts the provisions of section 47. In these circumstances, the question that aptly arises is which of the two supersedes the other.
- [43] I wish to emphasise from the outset that it hardly needs citation of authorities that the intention of the testator is always of paramount importance when dealing with a will. The general principles emerging from the jurisprudence on the issue of the intention of the testator is that the intention of the testator is the polar star by which the court should always be guided. Hence, the intention of the testator should be effectuated and not frustrated. It thus, makes sense that section 47, starts by stating the

following:

“Unless it is contrary to the will of the deceased. . .”

[44] Interestingly, the most telling aspect about the intention of the legislature is the fact that when the legislature drafted section 47, it did not employ the phrase ‘notwithstanding anything to the contrary in the will of the deceased’.

[45] The mischief sought to be avoided by the inclusion of ‘unless it is contrary to the will of the deceased’ is also plain. Surely, by using the words ‘unless it is contrary to the will of the deceased’, and not resorting to ‘notwithstanding

clause; the legislature did not want to interfere with freedom of testation by creating a potentially conflicting provision. Thus, because of freedom of testation the legislature could not interfere with the disposing power of a testator.

[46] Plainly, the use of the word ‘unless it is contrary to the will of the deceased’, allows a testator to direct a contrary intention to the legislative limits imposed by section 47. It means that the statutory provision applies ‘unless a contrary intention appears from the will. In other words, the provisions of section 47 do not apply if a contrary intention appears in the will. This grants the testator the powers to dispose of his property the way he deems fit. To think otherwise, it is a jump in legal logic.

[47] It seems obvious that the inclusion of the above cited words means that the intention of the testator always overrides the provisions of section 47. Section 47 pertinently states that unless a contrary intention is shown by the will, then section’s provisions would prevail. Surely, the words ‘unless it is to the contrary to the will of the deceased’ simply means that unless there is evidence to the contrary, the provisions of section 47 shall prevail.

‘A contrary intention’

[48] Section 47 is couched in clear and direct language.

[49] Insofar as it applies to section 47, to determine whether there is evidence of ‘a contrary intention’ must be assessed on a case-by-case basis. In the present case, owing to the language of clause 4.1.1, there is sufficient evidence on the face of the will that makes ‘a contrary intention’ to be apparent. The evidence is in the form of clause 4.1.1.; by way of express language, the testator has expressed his intention in clause 4.1.1.

[50] Importantly however, for reasons already given at

[46] above, I do consider that the words on close examination of the relevant clause and looking at the language used by the testator in clause 4.1.1., it is clear that in the present case, the intentions of the testator are contained in the will. Clause 4.1.1., specifically excluded everyone from the executor’s discretion. It is not difficult to imagine what the testator was intending when he crafted clause 4.1.1. It is significant to note that it is not contended that clause 4.1.1. is unlawful or invalid, or that it is void by uncertainty.

[51] It is discernible from the language used in clause 4.1.1 that it demonstrates an apparent conscious decision to express ‘a contrary intention’. In my view, when the will speaks of ‘my Eksekuteur se besluit sal finaal wees en nie hersienbaar’, this means that besides the

executor's general powers under the will the executor was also bestowed with full, absolute and unfettered discretion with the power to sell and to determine the price of the sale and his decision was made final. In essence, in terms of the will, the erstwhile executor had the power to implement his decision without consulting. The terms of the will are instructive.

- [52] Undoubtedly, the terms of the will contain words of 'a contrary intention'. In other words, by the terms of the will, a different intention of the testator is clearly disclosed. Thus, the will clearly and directly grants the executor sole authority to determine the terms upon which the immovable property of the estate should be disposed. The entire clause 4.1.1. constitute 'a contrary intention'.
- [53] In effect, the powers given to the executor in terms of clause 4.1.1. are very extensive. He [the executor] is essentially stepping into the shoes of the testator. The evidence is clear that the testator did not want the provisions of section 47 to apply to his estate to effect a different disposition. Hence, he specifically excluded the statutory provisions. In effect, the terms of the will are meant to defeat the operation of section 47.
- [54] In these circumstances, thus, regardless of the provisions of section 47, the contrary has been proven and accordingly the terms of the will have to prevail.
- [55] As already mentioned, Mr Quinn relied on a closer scenario to the present case that was addressed in Bagnall.
- [56] A succinct description of section 47 in Bagnall was provided by Henney J when he stated the following in paragraphs 50,53 and 54:

"[50] In clause 3.8 thereof the deceased expressly declared that his executrices:

'...shall have the power to continue with and carry on any business and/or investment in which I may be interested at the time of my death, and they shall have the powers to buy, sell by private treaty or public auction or otherwise . . . movable and/or immovable property . . . and to enter into any transaction, contract . . . or other obligation from time to time on behalf of my estate . . . in terms hereof as they may in their discretion consider advisable in the interests of the beneficiaries of my estate, notwithstanding the provisions of section 47 of the Administration of Estates Act No 66 of 1965.'

- [51] Thus, according to the deceased's will the executrices were expressly given the power to continue with the sale of the Camps Bay property, notwithstanding the provisions of s 47 of the Administration of Estates Act 66 of 1965."
- [53] In terms of the will the executrices were thus given the power to sell the Camps Bay property by majority decision and were not bound by the provisions of s 47, as set out above, even though they were unable to agree unanimously on the manner and conditions of the sale. The proviso in s 47(b) was not applicable in this matter, because the executrices were expressly exempted from the application thereof, in terms of clause 3.8 of the deceased's will. This means that in the event, as happened in this case, the heirs, who are also the

executrices, were unable to agree on the manner and conditions of the sale, they did not need the approval of the Master for the sale to proceed and to be given effect to.” Emphasis added,

[57] In the final analysis, the Bagnall decision, which is a full bench decision of this Division, supports the proposition that the intention of the testator or testatrix always prevails.

[58] The Bagnall case, as far as section 47 is concerned, stands four square with this case. As is clear from the case-law, the provisions of section 47 shall yield to and be superseded by the intention of the testator or testatrix.

[59] In the result I make the following order:

ORDER:

1. The first and second respondents within 45 (FORTY-FIVE) days from the date of this order, shall take all steps necessary which shall include, but shall not be limited to, signing all documentation to pass transfer of the undermentioned immovable properties to the applicants:

· Bella Vista Liquor Store with Licence Number: WCP 018129 situated at Erf 3[...], in Witzenberg Municipality, Division Ceres, Province of the Western Cape

Measuring 750m² (SEVEN HUNDRED AND FIFTY SQUARE METRES) in extent

Held in terms of Title Deed Nr. T17566/1991

Situated at 1 T[...] Street, Ceres, 6835 (“Erf 3[...”])

· Erf 3[...], Ceres, in Witzenberg Municipality, Division Ceres, Province of the Western Cape

Measuring 593m² (FIVE HUNDRED AND NINETY- THREE SQUARE METERS) in extent

Held in terms of Title Deed Nr. T37191/1992

Situated at 1 T[...] Street, Ceres, 6835 Erf (“3[...”])

2. The first and second respondents shall do all things necessary to seek from the Master of the High Court and lodge with the registration officer, in addition to any other necessary documentation, a certificate by the Master of the High Court that no objection to transfer of the immovable properties listed in paragraph 1 above exists.
3. In the event the first and second respondents fails, neglect or refuses to, within 45 (FORTY-FIVE) days from the date of this order, to take the necessary steps to give effect to paragraphs 1 and 2 above, the applicants’ attorney is hereby authorised to take the all necessary steps to pass transfer of the above-mentioned properties and the Sheriff of this Court is hereby authorised to sign all documentation on behalf of the first and second respondents and is directed to take all steps necessary, but not limited to signing documentation that is required, necessary or associated with passing transfer of the

properties into the name of the first and second applicants in order to pass transfer of the above-mentioned properties.

4. First and second respondents to pay costs of suit on scale B.

NZIWENI J

JUDGE OF THE HIGH COURT

Appearances Counsel for the Applicants Adv CJ Quinn Instructed by Joubert Van Vuuren Inc. Ref FVG/RR/MAT16539 Counsel for First Respondents: Adv M. Holland Instructed by John PJ Sauls Inc Ref RR/AD/K12-21

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